Supreme Court, U.S.
FILED

951437 MAR - 7 1996

OFFICE OF THE CLERK

No. _____

In The

Supreme Court of the United States

October Term, 1995

ALFREDO F. SMITH,

Petitioner,

v.

STATE OF NORTH CAROLINA,

Respondent.

Petition For Writ Of Certiorari
To The North Carolina Supreme Court

PETITION FOR WRIT OF CERTIORARI

RICHARD B. GLAZIER
BEAVER, HOLT, RICHARDSON, STERNLICHT
BURGE & GLAZIER, P.A.
230 Green Street
P.O. Box 2275
Fayetteville, NC 28302
(910) 323-4600

Counsel of Record for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

47 8

QUESTION PRESENTED

I. WHETHER, WHERE PETITIONER WAS FORCED TO DISROBE, BY DROPPING HIS PANTS AND UNDERWEAR, AND SUBJECT HIMSELF TO AN INVASIVE STRIP SEARCH IN THE MIDDLE OF AN INTERSECTION ON ONE OF FAYETTEVILLE, NORTH CAROLINA'S BUSIEST BOULEVARDS, EXPOSING HIMSELF TO ALL PASSERSBY AND WITH ALTERNATIVE, LESS INTRUSIVE MEANS FOR THE SEARCH READILY AVAILABLE TO LAW ENFORCEMENT OFFICERS, AND WHERE NO EXIGENT CIRCUMSTANCES EXISTED FOR THE SEARCH, THIS SEARCH OF PETITIONER WAS INTOLERABLE IN INTENSITY AND SCOPE AND, THEREFORE, UNREASONABLE UNDER THE FOURTH AMENDMENT?

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

TABLE OF AUTHORITIES iii

OPINIONS BELOW 1

JURISDICTION 1

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

A. The Facts 2

B. Proceedings in the Courts below 5

REASONS FOR GRANTING THE WRIT 7

I. This case presents an important constitutional question under the Fourth Amendment worthy of this Court's attention 7

II. The opinion below conflicts with the warning issued by this Court in *Illinois v. Lafayette*, 462 U.S. 640 (1983), that "interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street . . . " 19

CONCLUSION 20

TABLE OF AUTHORITIES

Page

CASES

Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L.Ed.2d 447 (1979) 8, 17

Boren v. Deland, 958 F.2d 987 (10th Cir. 1992) 12

Canedy v. Boardman, 16 F.3d 183 (7th Cir. 1994) 11

Chatman v. Nichols, 989 F.2d 393 (10th Cir. 1993) 11

Delaware v. Prouse, 440 U.S. 648, 99 S. Ct. 1391, 59 L.Ed.2d 660 (1979) 8

Franklin v. Foxworth, 31 F.3d 873 (9th Cir. 1994) 18

Graham v. Connor, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed.2d. 443 (1989) 8

Illinois v. Lafayette, 462 U.S. 640, 103 S. Ct. 2605, 77 L.Ed.2d 65 (1983) ..... *passim*

Mapp v. Ohio, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961) 7

Mary Beth G. v. City of Chicago, 723 F.2d 1263 (7th Cir. 1983) 11

New Jersey v. T.L.O., 469 U.S. 325, 105 S. Ct. 733, 83 L.Ed.2d 720 (1985) 7

State v. Clark, 65 Haw. 488, 654 P.2d 355 (1982) 11

Tennessee v. Garner, 471 U.S. 1, 105 S. Ct. 1694, 85 L.Ed.2d 1 (1985) 7

Terry v. Ohio, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968) 7, 8, 13

TABLE OF AUTHORITIES – Continued

Page

United States v. Alexander, 755 F. Supp. 448 (D.D.C. 1991), *aff'd.* 961 F.2d 964, *cert. denied*, ___ U.S. ___, 113 S. Ct. 170, 121 L.Ed.2d 117 (1992) 10

United States v. Bazy, 1994 WL 539300 (D. Kan. 1994) ..... *passim*

United States v. Cameron, 538 F.2d 234 (1976) 8, 11, 12

United States v. Guadalupe-Garza, 421 F.2d 876 (9th Cir. 1970) 8

United States v. Montoya De Hernandez, 474 U.S. 531, 105 S. Ct. 3304, 87 L.Ed.2d 381 (1985) 17

United States v. Vega-Barvo, 729 F.2d 1341 (1984) ...8, 12

Winston v. Lee, 470 U.S. 753, 105 S. Ct. 1611, 84 L.Ed.2d 662 (1985) 12

CONSTITUTIONAL & STATUTORY PROVISIONS

4th Amendment, U.S. Constitution ..... *passim*

14th Amendment, U.S. Constitution 2

28 U.S.C. §1257 1

Petitioner, Alfredo F. Smith, respectfully prays this Court grant a writ of certiorari to review the judgment and opinion of the North Carolina Supreme Court, entered in the above-entitled proceeding on December 8, 1995.

OPINIONS BELOW

The December 8, 1995, opinion of the North Carolina Supreme Court is reported at ___ N.C. ___, 464 S.E.2d 45 (1995) and is reprinted in the Appendix (hereinafter "App.") hereto, p. 1.

The March 7, 1995, opinion of the North Carolina Court of Appeals, reported at 118 N.C. App. 106, 454 S.E.2d 680 (1995) is reprinted at App. A-2.

JURISDICTION

The opinion and judgment of the North Carolina Supreme Court in this action issued on December 8, 1995. The jurisdiction of this Court to review the judgment of the North Carolina Supreme Court is invoked under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This case involves the Fourth and Fourteenth Amendments to the United States Constitution. The provisions of these Amendments are set out in the Appendix hereto, App. A-10 and A-11.

STATEMENT OF THE CASE

A. THE FACTS

On May 12, 1992, at approximately 12:15 a.m., James E. Cook, a deputy sheriff with the Cumberland County Sheriff's Department, received a call at his residence from a confidential informant. Cook had used information provided by this informant on two previous occasions. This individual informed Cook that Alfredo Smith would be in possession of two thousand dollars ($2,000.00) in cash and would be driving a red Ford Escort, with a specific license number. The informant further stated Mr. Smith would purchase cocaine, but he did not know the location of where the purchase was to take place. Alfredo Smith was then allegedly to return to a duplex apartment on a small dirt road off of Johnson Street in Fayetteville at a specific address. The informant stated Mr. Smith would package the cocaine at this location and then drive to another location off of Bragg Boulevard, a main thoroughfare in Fayetteville, North Carolina, to make the delivery.

The informant also told Cook that Alfredo Smith possessed cocaine in his crotch area. At no time, however,

did the informant ever tell Cook how he acquired any of the information concerning Mr. Smith.

After receiving this information, Cook contacted his partner and both officers picked up the informant, driving to a dirt road off of Johnson Street. By this time, a small Ford Escort was already at this address. The officers then released the informant. The officers did not witness petitioner arrive at this address from any previous location.

At approximately 1:30 a.m., the red Escort pulled out from the residence. The officers followed the car. Petitioner was stopped in the middle of the left turn lane off Johnson Street as he was heading onto Bragg Boulevard in Fayetteville, North Carolina, by both officers. Mr. Smith had not committed any traffic offense to necessitate the stop.

At that time, Alfredo Smith was forced to get out of his car. Cook began what he described, in a hearing on a motion to suppress, as a protective search for weapons or what is commonly known as a *Terry* stop. This search consisted of a pat-down of petitioner's person and a search of his automobile. Cook found no contraband, instrumentalities nor any evidence of a crime from either search.

At this point, Cook made a second and far more intrusive search of Smith's person. Cook asked Smith to "step behind the car door of [Smith's] vehicle, which was open and [Officer Cook] stood in between him and the car door on the outside." Cook then told Smith he believed Smith had cocaine in his underwear and asked him to open his pants. Cook stood between petitioner and

the car door because he "didn't want to expose him to other cars, the public, to embarrass, that sort of thing." Then, in the middle of the intersection of Johnson Street and Bragg Boulevard, Cook forced petitioner to pull down his pants and hold out his underwear while he shined a flashlight into petitioner's crotch area. This search also proved to be fruitless.

Believing Mr. Smith was holding his pants to his crotch area, the officers restrained Smith and shoved him against the car door while Cook pulled down defendant's underwear and shined a flashlight into the defendant's anus and onto his genitals. This search, like the previous, took place in the middle of the street. Petitioner, with his pants and underwear pulled down, was completely exposed to any passersby in traffic. Furthermore, petitioner did not consent to any of these searches.

During this third and most invasive search, Cook noticed a paper towel underneath petitioner's scrotum. Cook then pulled Mr. Smith's underwear down further, reached underneath Smith's scrotum with his bare hand and removed the paper towel. Inside the paper towel, the officers discovered a substance which a field test later indicated was cocaine. No warrant was issued for any of the three searches of Smith's person nor of his automobile.

Smith was then arrested, taken to the police station and booked on charges of possession of cocaine with intent to sell and deliver and maintaining a vehicle for the keeping and selling of a controlled substance.

B. PROCEEDINGS IN THE COURTS BELOW

At trial in the Superior Court of Cumberland County, North Carolina, petitioner moved to suppress all evidence of the search, arguing it violated his rights under the Fourth Amendment to the United States Constitution. The trial court denied petitioner's motion to suppress, finding probable cause existed to arrest Alfredo Smith on the street and the search was valid under the Fourth Amendment. Following a short jury trial, Alfredo Smith was convicted of possession of cocaine with intent to sell and deliver and maintaining a vehicle for the keeping and selling of a controlled substance.

On appeal, the North Carolina Court of Appeals found that, under the totality of the circumstances, probable cause existed to search petitioner without a warrant. *State v. Smith*, ___ N.C. App. at ___, 454 S.E.2d at 684. In addition, the Court found exigent circumstance existed to make the warrantless search of petitioner valid, *i.e.*, the probable disappearance or destruction of the controlled substance. *Id.* at ___, 454 S.E.2d at 685.

Notwithstanding the finding of probable cause and exigent circumstances for a warrantless search, the Court of Appeals went on to find the search of petitioner nevertheless "violated the Fourth Amendment through its intolerable intensity and scope." *Id.* Specifically, the Court of Appeals held:

> The search of defendant in this case was akin to a strip search in a public place and was not "limited in scope" nor "required by unusual circumstances." There is nothing under the facts of this case to suggest that defendant could have disposed of the drugs before being placed in the

> patrol car or taken to the station. Under these circumstances, the search of defendant was intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment.

Id. at ___, 454 S.E.2d at 686.

The decision of the Court of Appeals contained a dissenting opinion by Judge Walker which found, while there may have been other less intrusive means for conducting the search, the search was otherwise reasonable and did not violate the Fourth Amendment. *Id.* at ___, 454 S.E.2d at 687.

From the decision from the North Carolina Court of Appeals, the State appealed to the North Carolina Supreme Court. Following briefing and oral argument, the North Carolina Supreme Court reversed the decision of the North Carolina Court of Appeals in a one sentence *per curiam* opinion as follows:

> Reversed for the reasons stated in the dissenting opinion by Judge Walker.

App. at 9.

This petition for writ of certiorari is filed seeking review of the decision of the North Carolina Supreme Court.

REASONS FOR GRANTING THE WRIT

I. This case presents an important constitutional question under the Fourth Amendment worthy of this Court's attention

At its core, this case asks whether the Fourth Amendment permits a law enforcement officer to demand and physically force a citizen to disrobe in the middle of a public street and then submit to an invasive strip search with a flashlight, exposing himself to all passersby, where no exigent circumstances exist justifying such a warrantless search.

"[T]he underlying command of the Fourth Amendment is always that searches and seizures be reasonable." *New Jersey v. T.L.O.*, 469 U.S. 325, 337, 105 S. Ct. 733, 740, 83 L.Ed.2d 720, 731 (1985). Even a search conducted with a warrant – which this one was not – must be carried out in a reasonable manner.

In determining what is reasonable, this Court has looked at the individual circumstances of each particular case. *Mapp v. Ohio*, 367 U.S. 643, 81 S. Ct. 1684, 6 L.Ed.2d 1081 (1961). In *Terry v. Ohio*, 392 U.S. 1, 88 S. Ct. 1868, 20 L.Ed.2d 889 (1968), this Court held that a "search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." 392 U.S. at 17, 88 S. Ct. at 1878. In *Tennessee v. Garner*, 471 U.S. 1, 105 S. Ct. 1694, 85 L.Ed.2d 1 (1985), the Court went on to flatly reject the argument Fourth Amendment protections only run to the probable cause requirement, holding that "reasonableness depends on not only when a seizure is made, but also how it is carried out." 471 U.S. at 8, 105 S. Ct. at 1699 *citing United*

States v. Ortiz, 422 U.S. 891, 895, 95 S. Ct. 2585, 45 L.Ed.2d 623 (1975) and *Terry v. Ohio, supra*.

Thus, in determining whether a search comports with the requirements of the Fourth Amendment, "[t]he scope of the particular intrusion, the manner of its conduct and the justification for initiating it must all be considered." *United States v. Guadalupe-Garza*, 421 F.2d 876, 878 (9th Cir. 1970) *cited in United States v. Cameron*, 538 F.2d 234, 258 (1976). *See also Graham v. Connor*, 490 U.S. 386, 109 S. Ct. 1865, 104 L.Ed.2d 443, 454 (1989). As Judge, now Justice, Kennedy wrote for the Ninth Circuit, "a clear indication that the suspect is concealing contraband does not authorize government officials to resort to any and all means at their disposal to retrieve it." *United States v. Cameron, supra*. In that vein, any body search, if it is to comport with the Fourth Amendment's reasonableness requirement, "must be conducted with regard for the subject's privacy and be designed to minimize emotional and physical trauma." *Id. See also United States v. Vega-Barvo*, 729 F.2d 1341, 1345 (1984).

Four factors are relevant to the reasonableness of a search: (1) The place in which the search is conducted, (2) The manner in which the search is conducted, (3) The justification for initiating the search, and (4) The scope of the particular intrusion. *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S. Ct. 1861, 1884, 60 L.Ed.2d 447, 481 (1979). This inquiry balances the extent of the intrusion on an individual's Fourth Amendment interest and the promotion of legitimate governmental interest. *Delaware v. Prouse*, 440 U.S. 648, 654, 99 S. Ct. 1391, 1396, 59 L.Ed.2d 660, 667-68 (1979).

Applying the above factors *seriatim* leads to the inexorable conclusion, as the North Carolina Court of Appeals held below, that this search "violated the Fourth Amendment through its intolerable intensity and scope." *State v. Smith*, ___ N.C. App. at ___, 454 S.E.2d at 685. Indeed, the search in this case was so patently repugnant to the personal rights held by all Americans under the Fourth Amendment, that this case merits this Court's review. If the framers of the Constitution meant anything by the words of the Fourth Amendment, then surely it was intended that no official of the government could force a citizen to disrobe in public and bare their genitals to all passersby absent extraordinary, exigent circumstances. As detailed below, neither the trial court nor the appellate courts below found the existence of any exigent circumstances meriting such action. Accordingly, even with significant governmental interests at stake in the prevention of narcotics transactions, the Fourth Amendment and, therefore, this nation cannot long endure if actions such as the one at bar are allowed to continue as standard operating procedure for any law enforcement agency.

The first factor in determining the reasonableness of the conduct below is the place where the search was conducted. Here, the search could not have been conducted in a place more open to public view and less concerned with minimizing exposure and trauma to the suspect than the middle of one of Fayetteville, North Carolina's busiest thoroughfares, Bragg Boulevard.

In *Illinois v. Lafayette*, 462 U.S. 640, 103 S. Ct. 2605, 77 L.Ed.2d 65 (1983), this Court upheld a warrantless search of a shoulder bag as part of a routine inventory search at

a station house of a person under lawful arrest. The Court held the fact that less intrusive means existed, such as sealing the bag, did not make the search unreasonable.

At the same time, however, the Court indicated the necessary scope of any search varies depending on where the search is conducted:

> Police conduct that would be impractical or unreasonable – or embarrassingly intrusive – on the street can more readily – and privately – be performed at the station. *For example, the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street,* but the practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him, although that step would be rare.

Id., at 645, 103 S. Ct. at 2609, 77 L.Ed.2d at 71. (Emphasis added). Yet, despite the warning of this Court in *Illinois v. Lafayette, supra,* that even a search incident to arrest would not justify disrobing an arrestee on a public street, that is precisely what occurred here. Furthermore, the disrobing and flashlight search occurred, not pursuant to a search incident to arrest, but without an arrest even taking place. *See United States v. Alexander,* 755 F. Supp. 448, 454 (D.D.C. 1991), *aff'd.* 961 F.2d 964, *cert. denied,* ___ U.S. ___, 113 S. Ct. 170, 121 L.Ed.2d 117 (1992) ("[T]he presence of probable cause to arrest, when the police have not effected an arrest, permits a more limited search than that permitted incident to arrest.").

Strip searches, in public places, should be justified only in the rarest of circumstances where strong exigencies require such action. Here, neither the trial court nor

the courts below found the existence of any exigency, let alone any threat to flee, destroy evidence or a health hazard to petitioner.

Second, the manner in which this search was conducted was wholly at odds with the general protections provided by the Fourth Amendment. Courts have been widely critical of strip searches because "few exercises of authority by the State . . . intrude on the citizen's privacy and dignity as severely as . . . visual, anal and genital searches." *Mary Beth G. v. City of Chicago*, 723 F.2d 1263, 1272 (7th Cir. 1983). The privacy interests infringed by a strip search are extraordinary. "There is no expectation of privacy of greater legitimacy than that which we have in our 'private parts.' " *State v. Clark*, 65 Haw. 488, 493, 654 P.2d 355, 359 (1982). Any body search where the subject's clothes are removed to some extent "is a gross violation of privacy." *United States v. Cameron*, 538 F.2d at 258. "One of the clearest forms of degradation in Western Society is to strip a person of his clothes. The right to be free from strip searches and degrading body inspections is thus basic to the concept of privacy." *Canedy v. Boardman*, 16 F.3d 183, 185 (7th Cir. 1994).

A strip search, or its equivalent, even in circumstances of pre-trial detention, is an invasion of personal rights of the first magnitude. *Chatman v. Nichols*, 989 F.2d 393, 395 (10th Cir. 1993). The Seventh Circuit has described strip searches and all substantially similar searches as "demeaning, dehumanizing, undignified, humiliating, terrifying, unpleasant, embarrassing, repulsive, signifying degradation and submission." *Mary Beth G. v. City of Chicago*, 723 F.2d at 1271. No matter how professional or courteous the manner used in conducting

such a physically and emotionally invasive search, it remains, at best, an extraordinarily embarrassing and humiliating experience. *Boren v. Deland*, 958 F.2d 987, 988 n. 1 (10th Cir. 1992). *See also United States v. Vega-Barvo*, 729 F.2d at 1347 ("[t]he embarrassment caused by the exposure of intimate body parts is often a determinative factor in the constitutionality of searches").

Because a strip search is such a devastating invasion of the personal rights of the person being searched, it "must be conducted with regard for the subject's privacy and be designed to minimize emotional and physical trauma." *Cameron*, 538 F.2d at 258. Therefore, when the State seeks to intrude upon a person's body, as in a strip search, a more substantial justification is required to make the search reasonable. *Winston v. Lee*, 470 U.S. 753, 767, 105 S. Ct. 1611, 1620, 84 L.Ed.2d 662, 673 (1985). As the North Carolina Court of Appeals noted in this case, "searches akin to strip searches can be justified in public places if limited in scope and required by unusual circumstances." *Smith*, 454 S.E.2d at 684 *quoting United States v. Bazy*, 1994 WL 539300 (D. Kan. 1994).

In the case at bar, the manner in which this search was conducted was extraordinarily intrusive and invasive. Mr. Smith was forced to drop his pants and underwear and was subjected to a highlighted strip search and view of his genitals in the middle of the intersection of Johnson Street and Bragg Boulevard. It is hard to envision a more humiliating, demeaning search in public shy of an anal search by the officer in the middle of a crowded public building.

In this regard, although few cases similar to this search have even been reported in this country, because one would assume this conduct, until recently, was generally recognized as outrageous and therefore not attempted, the North Carolina Court of Appeals and both parties in the case in briefs before the North Carolina appellate courts used the decision in *United States v. Bazy, supra,* as a critical case for analysis.

In *Bazy, supra,* officers stopped Bazy and a companion for speeding on a Kansas turnpike at 8:30 a.m. At the Kansas Highway Patrol Trooper's request, the driver, Bazy's companion Parker, admitted his driver's license was suspended. A record check on Parker's license established it was suspended, that he had two prior convictions for driving while suspended and he was wanted on a Missouri traffic warrant for failure to appear. The trooper also learned form the license check that Parker had prior arrests for weapons charges and that Bazy was on parole. The car Bazy and Parker were driving was not registered to either of them.

During a consent search of the automobile that followed, a loaded gun was found under the seat where Bazy had been sitting. The trooper then placed the defendants on the patrol car's hood and did a *Terry* pat down search for weapons. One of the troopers found a large object in Parker's front pants pocket. It was a large plastic bag containing numerous smaller plastic bags. A pager clipped onto Parker's pants pocket was also removed. At this point, both defendants were handcuffed for the Trooper's protection. The defendants were, in fact, placed under custodial arrest with probable cause to arrest existing.

A subsequent search of the car found drug paraphernalia, a crack pipe and a rolling machine in the glove compartment. A canine sniff produced additional evidence of drug involvement.

Concerned that Bazy was too close to the traffic lane with all of this occurring, the trooper asked him to move closer to the roadway's edge. Bazy replied he could not stand because his right leg had fallen asleep. The trooper then reached down to move Bazy's leg and found a block of crack cocaine in his right trouser leg.

Following this incident, Bazy was observed as "squirming an unusual amount." *Id.* at 2. A second block of crack cocaine fell out of Bazy's right trouser leg on the side of the road. It was only at this time, having obtained all of this evidence and observed Bazy's continuing to squirm, that troopers unbuckled Bazy's pants and pulled them away from his waist, checking his underwear for drugs. They found a plastic-wrapped substance lodged between Bazy's buttocks. The trooper then, with plastic gloves, removed the matter with a portion of the plastic wrapper having been stuck in Bazy's rectum. *Id.* at 3.

Bazy was in custody and under arrest at the time of the invasive physical search. Furthermore, the intrusion in *Bazy* was very limited in scope. Bazy was not required to drop his pants and underwear nor disrobe in any manner. He was not required to submit to a visual body cavity search. The trooper simply loosened Bazy's pants so he could reach inside. The trooper wore plastic gloves when he reached into Bazy's underwear and felt for the drugs. The search was conducted while the defendant

stood between two cars on the grassy edge of the roadway with public view blocked by the defendant's clothes, which remained up, a trooper and the cars. *Id.*

Unlike *Bazy*, Alfredo Smith was not searched on the side of the road; he was searched in the middle of one of Fayetteville's busiest intersections. Unlike *Bazy*, Alfredo Smith was not allowed to keep his clothes on; instead, he was forced to substantially disrobe by having both his pants and underwear dropped so his private body parts were fully exposed to public view by flashlight. Unlike *Bazy*, insufficient evidence exists to suggest the public's view of a disrobed Alfredo Smith was in any significant manner blocked by patrol cars, Alfredo Smith's car or the officers as found by the North Carolina Court of Appeals. Unlike *Bazy*, plastic gloves were not used in the search and far less precautions were taken to minimize Mr. Smith's fear and humiliation.

Furthermore, in *Bazy*, the defendant attempted to dispose of drugs prior to the invasive search; no such attempt occurred here. And, unlike *Bazy*, in this case there was no finding of any drugs or weapons in the initial search of petitioner or petitioner's car and Mr. Smith was not under arrest.

Given all of these circumstances, the manner in which the search at bar was conducted was patently unreasonable when compared to the search in *Bazy*, as closely analogous a case as seemingly can be found.

Turning to the third factor this Court has identified as relevant to the reasonableness determination, the justification for initiating the search, at the time of the search, Mr. Smith was not under arrest. Probable cause to search

existed, but as Officer Cook stated at the Motion to Suppress hearing in this case, petitioner was not under arrest at the time of the search. Presence of probable cause to search or even arrest, when there has been no arrest, justifies a far more limited search than that permitted search incident to arrest. *United States v. Alexander, supra.*

In addition, although law enforcement officers do not have to use the least intrusive means, the availability of less intrusive alternatives is a factor in the reasonableness calculation. Here, the officers could have accomplished their objective by searching Mr. Smith in the patrol car, in a private area shielded off the thoroughfare or at the police station. *See Illinois v. Lafayette, supra.* They did none of these nor, from the record, is there any evidence that any alternative was considered.

Finally, looking at the scope of the intrusion, it would be an understatement to describe the search in this case as "substantial". No case was cited to the North Carolina Court of Appeals nor to the North Carolina Supreme Court nor was any found by either Court, as expressed in the respective opinions, where a warrantless, strip search was conducted on public thoroughfare and found to be reasonable under the Fourth Amendment. Unlike *Bazy,* no evidence suggests the existence of any exigency for the search at Johnson Street and Bragg Boulevard. Unlike *Bazy,* no evidence existed in this case for any officer to reasonably assume defendant was attempting, through any movement, to "push the drugs deeper between the buttocks to avoid detection." Indeed, the officers' prior information suggested the drugs were attached to the petitioner's scrotum, not carried in any body cavity. In that sense, the *Bazy* court's concern with exigencies of

imminent destruction of evidence and the health of the defendant through that defendant's efforts to push the drugs into his body is simply not an argument available to the State of North Carolina in this case.

Furthermore, unlike *Bazy*, precautions in the search to limit humiliation and fear were not undertaken by the officers in this case. Plastic gloves were not used in the search. A flashlight was used to highlight the search of Alfredo Smith in full view of the public in the middle of Johnson Street and Bragg Boulevard. In short, comparison to *Bazy* strongly supports the Court of Appeals' decision below and its finding that the officers exceeded the reasonableness limitation of the Fourth Amendment.[1]

On balance, the privacy interests of petitioner in this action far outweighed the Government's interest in conducting a visual strip search in the middle of a public thoroughfare in Fayetteville, North Carolina. The interests of the Government in the prevention of crime, particularly drug trafficking, and the enforcement of the criminal law are substantial. Yet, petitioner could just as easily have been searched at the law enforcement center, in the officer's patrol car or even after transportation to a

---

[1] In only two situations has this Court held warrantless strip searches to be reasonable. The first is in the context of border crossings, where the Court has ruled that an individual's expectation of privacy is lessened and the Government's interests are heightened thus allowing for more intrusive searches on a lower showing of suspicion. *E.g., United States v. Montoya De Hernandez*, 474 U.S. 531, 105 S. Ct. 3304, 87 L.Ed.2d 381 (1985). The second is in prison situations. *See, e.g., Bell v. Wolfish, supra*. Neither of these situations is applicable to the case at bar.

more private area. What occurred in this case was precisely the conduct this Court warned against in *Illinois v. Lafayette, supra*. Notwithstanding that explicit warning, none of the easily and readily available procedures suggested above for a more humane and less degrading search were used and, obviously, no search warrant was obtained justifying this most personal and invasive of procedures. *See Franklin v. Foxworth*, 31 F.3d 873, 875 (9th Cir. 1994) (a detention conducted in connection with a search may be unreasonable if it is unnecessarily degrading, prolonged or involves an undue invasion of privacy).

Pulling an individual's pants and underwear down in the middle of a major urban thoroughfare and then conducting an invasive flashlight search of the defendant's private body parts is precisely the type of degrading, dehumanizing search the Fourth Amendment was intended to prevent. *See Bazy* at 8 ("[O]rdinarily, when police wish to search the private areas of an arrestee's person incident to arrest, they should first remove the arrestee to the stationhouse"). If this search is not found to be unreasonable, it is difficult to imagine any scenario in which a public, warrantless strip search would be unreasonable. If this search is upheld, a reasonable law enforcement officer would be led to believe a strip search in public view is justified anytime a suspect is thought to be hiding drugs. This development would be a serious erosion of individual privacy, dignity and autonomy, the essential values the Fourth Amendment is designed to protect.

Although it is true petitioner was in possession of a controlled substance on this occasion, the next search of

this kind may take place on an individual who is completely innocent. The Fourth Amendment protects them both. In the end, paraphrasing Thomas Jefferson: A nation that trades a little bit of freedom for a little bit of order will end up with and deserve neither. The decision of the North Carolina Supreme Court, which must be reviewed, regrettably seeks to trade a little bit of freedom for a little bit of order. It cannot be allowed to stand.

II. The opinion below conflicts with the warning issued by this Court in *Illinois v. Lafayette*, 462 U.S. 640 (1983), that "interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street . . . "

As stated in the first reason for granting the writ, this Court, although not rendering a holding on the facts of this case, discussed a factual scenario nearly identical to the case at bar when it stated in *Illinois v. Lafayette, supra*:

> Police conduct that would be impractical or unreasonable – or embarrassingly intrusive – on the street can more readily – and privately – be performed at the station. *For example, the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street,* but the practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him, although that step would be rare.

Id. at 645, 103 S. Ct. at 2609, 77 L.Ed.2d at 71. (Emphasis added). The North Carolina Supreme Court's decision in this case is directly at odds and in conflict with this Court's discussion of disrobing an arrestee on a public

street or thoroughfare set forth in *Illinois v. Lafayette, supra*. As such, the decision of the North Carolina Supreme Court must be reviewed and reversed.

CONCLUSION

The issue presented in this case merits consideration by this Court. The issue is plainly, clearly and simply set forth. There are no collateral issues which will complicate the Court's treatment of this case and lengthen the proceedings. The case at bar presents a critical constitutional question under the Fourth Amendment. If the Fourth Amendment means anything, it means that no citizen, guilty or innocent, should be forced to take off their clothes on a public street of a city in the United States at the order of an official of a local, state or federal government agency. Accordingly, petitioner respectfully requests a petition for writ of certiorari to the North Carolina Supreme Court issue to review the decision below.

Respectfully submitted, this the 7th day of March, 1996.

BEAVER, HOLT, RICHARDSON,
STERNLICHT, BURGE &
GLAZIER, P.A.

RICHARD B. GLAZIER
230 Green Street
P. O. Box 2275
Fayetteville, NC 28302
Telephone: (910) 323-4600
Attorney for Petitioner

APPENDIX

1. December 8, 1995, Decision of the North Carolina Supreme Court A-1

2. March 7, 1995, Decision of the North Carolina Court of Appeals A-2

3. Fourth Amendment to the United States Constitution A-20

4. Fourteenth Amendment to the United States Constitution A-21

IN THE SUPREME COURT OF NORTH CAROLINA

STATE OF NORTH CAROLINA	)	
	)	No. 125A95 –
v.	)	Cumberland
	)	
ALFREDO F. SMITH, JR.	)	(Filed
	)	Dec. 8, 1995)

Appeal by the State pursuant to N.C.G.S. § 7A-30(2) from a decision of a divided panel of the Court of Appeals, 118 N.C. App. 106, 454 S.E.2d 680 (1995), granting the defendant a new trial. Heard in the Supreme Court 17 November 1995.

Michael F. Easley, Attorney General, by Robin P. Pendergraft, Special Deputy Attorney General, for the State.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by Richard B. Glazier, for defendant-appellee.

American Civil Liberties Union Legal Foundation, by Deborah K. Ross, amicus curiae.

PER CURIAM.

Reversed for the reasons stated in the dissenting opinion by Judge Walker.

REVERSED.

118 N.C.App. 106

STATE of North Carolina

v.

Alfredo F. SMITH, Jr.

No. 9412SC419.

Court of Appeals of North Carolina.

March 7, 1995.

Appeal by defendant from judgments entered 11 February 1993 in Cumberland County Superior Court by Judge E. Lynn Johnson. Heard in the Court of Appeals 24 January 1995.

Atty. Gen. Michael F. Easley by Sp. Deputy Atty. Gen. Robin P. Pendergraft, for the State.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A. by Richard B. Glazier, Fayetteville, for defendant-appellant.

GREENE, Judge.

Alfredo F. Smith, Jr. (defendant) appeals from judgments entered 11 February 1993 in Cumberland County Superior Court, after a jury found him guilty of one count of intentionally keeping and maintaining a vehicle used for the purpose of unlawfully keeping or selling controlled substances and one count of possession with intent to manufacture, sell and deliver a controlled substance. Defendant received fifteen years imprisonment.

Defendant was indicted for maintaining a vehicle to keep and sell controlled substances and for possession with intent to manufacture, sell and deliver a controlled substance on 27 July 1992. On 10 February 1993, defendant filed a pre-trial motion to suppress evidence and an affidavit supporting this motion, claiming the search and seizure of defendant on 12 May 1992 was illegal. Before trial, the trial court conducted a suppression hearing on defendant's motion.

The State's evidence tended to show the following: Officer Cook has known defendant for the two to three years prior to 12 May 1992 he has worked in the Bonnie Doone area of Fayetteville, an area known to have a drug problem. Officer Cook described the Bonnie Doone area as a "large housing area with a main thoroughfare, Bragg Boulevard, running through it. . . . [F]rom Bragg Boulevard would be Johnson Street, Andy Street, Mike Street, the main thoroughfares." Prior to 12 May 1992, Officer Cook had been informed numerous times from different sources that defendant was operating a drug house and selling drugs in the Bonnie Doone area. Confidential sources told him defendant "had houses that he was selling drugs from" and "was in charge of some of the people who were staying in the houses, that he delivered the drugs to them, and they in turn sold them for him, and he received the profits."

At 12:15 a.m. on 12 May 1992, Officer Cook received a call from a source he had used two times in the past "where arrests had been made and narcotics were seized" and whom Officer Cook knew to be a reliable source. The

informant told Officer Cook that defendant had approximately two thousand dollars in his possession, was operating a red Ford Escort with the license plate EVN7322, and was going to an unknown location to purchase cocaine. The informant said that once defendant had purchased the cocaine, he would be returning to an apartment, 617-D Johnson Street, which the informant described as the last apartment on the left. The informant also told Officer Cook that once defendant returned to 617-D, defendant would be packaging the cocaine in aluminum foil and going shortly thereafter to a house on Buffalo Street off of Bragg Boulevard to deliver the cocaine, where it would be sold. The informant stated when defendant "departed [617-D] Johnson Street that he would have the cocaine concealed in his crotch, or under his crotch."

Officer Cook immediately called his partner, Officer O'Briant and contacted his supervisor. He then met Officer O'Briant in the Bonnie Doone area, picked up the informant, and had him take the officers to Johnson Street. As they approached the last apartment on the left, the informant pointed out a red Ford Escort outside the apartment and stated "that's the vehicle" and that defendant "would be leaving quickly" and "wouldn't stay there long." The officers, in two separate vehicles, backed down the road to avoid detection and released the informant. It was approximately 1:15 a.m. on 12 May 1992.

At approximately 1:30 a.m. on 12 May 1992, the red Ford Escort pulled out of the dirt road onto Johnson Street and turned right on Johnson Street toward Bragg Boulevard. The license plate on this red Ford Escort was

EVN7322. The officers turned on their blue lights and stopped defendant in "the center lane, the left turn lane" where Johnson Street "came to Bragg Boulevard." After they identified themselves and told defendant they had information he was transporting cocaine in his vehicle, Officer Cook conducted a weapons search or pat-down search of defendant and of his vehicle. Officer Cook then informed defendant he was going to search him completely using his flashlight and hands. He asked defendant "to step behind the car door of [defendant's] vehicle, which was open, and [Officer Cook] stood in between him and the car door on the outside." Officer Cook then informed defendant he believed defendant had concealed cocaine inside his underwear and asked him to open his trousers. Officer Cook stood between defendant and the "doorway" because he "didn't want to expose him to other cars, the public, to embarrass him, that sort of thing." Because Officer Cook could not see underneath defendant's scrotum and testicles and could not see anything to the back or front of defendant, he asked him to pull his underwear down further. Because defendant resisted to pulling his underwear down further, Officer Cook testified, "I walked to the front of [defendant] and held open his underwear . . . and slid it down. At which point with my flashlight I could see the corner of a small paper towel underneath his scrotum. I then pulled his underwear farther. [Defendant] resisted a little bit. I pushed him back into the door and reached into, uh – underneath his scrotum and removed the paper towel" which contained crack cocaine. After the police executed a search warrant, they found out the last apartment on the left which the informant had pointed out was actually

617-F Johnson Street. They did not find anything in 617-D.

Defendant testified that on 12 May 1992, he had been at 617-F Johnson Street prior to 1:15 a.m. He stated that Johnson Street is a one-lane road, "but as you approach Bragg Boulevard, it become [sic] a two-lane road towards the intersection." After he was stopped by Officers Cook and O'Briant, he asked them what the probable cause was for stopping him and refused search of the car. Defendant testified that he agreed to the search of his vehicle after Officer O'Briant threatened to hit him. After searching the vehicle, Officer Cook asked defendant to pull his underwear down, and defendant pulled out his "short set, along with the underwear, and show[ed] him [his] testicles." Officer Cook then asked defendant to turn around. Defendant refused, stating "[y]ou are not searching me in my rear, in my butt, in the middle of the street. . . . We [sic] standing in the middle of the intersection of Bragg Boulevard and Johnson Street. He wants to search my rear." Officer Cook grabbed defendant's "short set" and underwear, "pulled it down, and shined his flashlight in [his] butt."

Officer Cook then instructed defendant to stand next to Officer O'Briant while he conducted a second search of the car. When he finished, he told defendant he wanted to search him again, but defendant refused. The officers each grabbed one of defendant's hands and searched defendant again, which resulted in finding the cocaine.

Based on the testimony received at the suppression hearing, the court made the following pertinent findings of fact:

> 2. That Mr. Cook is familiar with the way drugs are sold in the Cumberland County community. And that prior to May 12, 1992, that Deputy Sheriff Cook had worked the Bonnie Doone area for approximately a two to three year period prior to that date and time.
>
> 3. That prior to May 12th, 1992, Mr. Cook had known the defendant for a substantial period of time prior thereto and was familiar with the way drugs were sold in the Bonnie Doone community, being through various street dealers and inside various residences located in that community. . . .
>
> 4. That over a period of time preceding May 12, 1992, Mr. Cook and other members of the Special Operations Unit had received numerous pieces of information concerning the way the defendant operated a drug organization in the Bonnie Doone community, operating through various drug houses, selling drugs from various street – selling drugs through various street dealers, and operating houses where prostitutes also operated. . . .
>
> 6. . . . the confidential source of information had at least on two prior occasions furnished very specific information concerning drugs and that such information furnished to Deputy Sheriff Cook had lead [sic] to at least two arrests; that at least one other officer had also used the same informant on a prior date and time and that the information furnished by the informant had always proved to be reliable.

The court also found that the informant had told Officer Cook defendant would be driving a red Ford Escort with license plate number EVN7322 on 12 May 1992, would be

returning to an apartment on Johnson Street, identified as the last apartment on the left, and that defendant would be packaging cocaine and leaving the apartment with the packaged cocaine concealed in his crotch area. The court found that thereafter, Officers Cook and O'Briant observed the red Ford Escort outside the last apartment on the left on Johnson Street, informant stated "that's the vehicle," and the officers observed the Escort leave. After the officers stopped the Escort, they identified defendant as the driver, searched him and found cocaine in a paper towel concealed in defendant's scrotum area. Based on these and other findings, the trial court concluded there was probable cause "for the stop and search of the red Ford Escort automobile and the subsequent search of the defendant," "[t]hat none of the defendant's rights under the Fourth Amendment of the United States Constitution or the equivalent provision of the North Carolina Constitution have been violated," and "[t]hat none of the defendant's statutory rights under the laws of the State of North Carolina have been violated." The court therefore denied defendant's motion to suppress to which defendant objected.

The issues presented are whether (I) under the totality of the circumstances, there was probable cause and an exigency for a warrantless search of defendant; and (II) the search was reasonable in scope.

I

In reviewing the denial of a motion to suppress, we are limited to determining whether the trial court's findings of fact are supported by competent evidence and whether the findings of fact in turn support legally correct conclusions of law. *State v. Cooke*, 306 N.C. 132, 134, 291 S.E.2d 618, 619 (1982). Although defendant had the burden of producing a supporting affidavit under his motion to suppress, the State "still has the burden of proving that the evidence was lawfully obtained." *State v. Gibson*, 32 N.C.App. 584, 586, 233 S.E.2d 84, 86 (1977); *see also State v. McCloud*, 276 N.C. 518, 173 S.E.2d 753 (1970) (one who seeks to justify warrantless search has burden of showing exigencies of situation made search without warrant imperative). Defendant concedes in his brief that "reasonable suspicion existed to justify a *Terry* stop and frisk"; however, he argues "this suspicion clearly did not rise to the level of probable cause" to justify a warrantless search of defendant. We disagree.

If probable cause to search exists and the exigencies of the situation make a warrantless search necessary, it is lawful to conduct a warrantless search. *State v. Mills*, 104 N.C.App. 724, 730, 411 S.E.2d 193, 196 (1991). " 'Probable cause exists where "the facts and circumstances within their [the officers'] knowledge and of which they had reasonable trustworthy information [are] sufficient in themselves to warrant a man of reasonable caution in the belief that" an offense has been or is being committed.' " *State v. Zuniga*, 312 N.C. 251, 261, 322 S.E.2d 140, 146 (1984) (*quoting Brinegar v. United States*, 338 U.S. 160, 175-76, 69 S.Ct. 1302, 1311, 93 L.Ed. 1879, 1890, *reh'g denied*, 338 U.S. 839, 70 S.Ct. 31, 94 L.Ed. 513 (1949)).

"Probabilities . . . are not technical; they are the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act. The standard of proof is accordingly correlative to what must be proved." *Id.*

The United States Supreme Court determined that when deciding whether information received from a confidential informant properly forms the basis of probable cause to search or arrest, courts must review the "totality of the circumstances." *Illinois v. Gates*, 462 U.S. 213, 238, 103 S.Ct. 2317, 2332, 76 L.Ed.2d 527, 548, *reh'g denied*, 463 U.S. 1237, 104 S.Ct. 33, 77 L.Ed.2d 1453 (1983); *see State v. Riggs*, 328 N.C. 213, 219, 400 S.E.2d 429, 433 (1991) (North Carolina Supreme Court has accepted *Gates* as appropriate standard for showing probable cause under both federal and state constitutions). The Court emphasized that "[o]ur decisions applying the totality-of-the-circumstances analysis . . . have consistently recognized the value of corroboration of details of an informant's tip by independent police work." *Gates*, 462 U.S. at 241, 103 S.Ct. at 2334, 76 L.Ed.2d at 550. The Court emphasized that "probable cause does not demand the certainty we associate with formal trials." *Id.* at 246, 103 S.Ct. at 2336, 76 L.Ed.2d at 553. Therefore, it is enough if there is a "fair probability" that a confidential informant obtained his entire story either straight from a defendant or from someone he trusted, and corroboration of "major portions of the [informant]'s predictions provides just this probability." *Id.*

Based on these principles, the officers in this case had probable cause to search defendant on Bragg Boulevard

under the totality of the circumstances. The State's evidence shows Officer Cook received a phone call at 12:15 a.m. on 12 May 1992 from an informant he had used on two prior occasions that had led to arrests. The informant told Officer Cook that defendant would be driving a red Ford Escort with license plate EVN7322, would be picking up cocaine, would be arriving at the last apartment on the left on Johnson Street to package the cocaine in aluminum foil, would be going to a house on Buffalo Street off of Bragg Boulevard to deliver the cocaine, where it would be sold, and would have the cocaine concealed in his crotch or under his crotch. Based on this information, Officer Cook met Officer O'Briant at approximately 1:30 a.m. and picked up the informant. Once they were near the last apartment on the left on Johnson Street, the informant pointed out a red Ford Escort outside the apartment and stated "that's the vehicle." At approximately 1:30 a.m. on 12 May 1992, the red Ford Escort with license plate EVN7322, with defendant driving, pulled out of the dirt road onto Johnson Street and turned right on Johnson Street toward Bragg Boulevard.

Officers Cook and O'Briant independently corroborated the information received from the confidential informant except that defendant had successfully concealed the cocaine on his person. The informant in this case provided detailed predictions of defendant's future actions ordinarily not easily predicted. Furthermore, Officer Cook was familiar with defendant, familiar with the drug area of Fayetteville, and had received on numerous occasions from numerous sources information that defendant was operating houses out of which drugs were sold. The officers therefore had reasonable grounds to believe

the remaining unverified information, that defendant did conceal drugs in his underwear for transport, was likewise true. Considering all these facts and circumstances together, "a man of reasonable caution" would believe that "an offense has been or is being committed."

Exigent circumstances also existed to make the warrantless search of defendant valid. In this case, the information received by Officer Cook revealed that defendant was going to obtain drugs and then deliver them to another location. If the officers had "taken the time to obtain a search warrant, the delay might have caused a 'probable absence of the purported drug violator' " and also the probable disappearance or destruction of the controlled substances. *Mills,* 104 N.C.App. at 731, 411 S.E.2d at 197. Accordingly, the officers conducted a lawful search of defendant based upon probable cause and the existence of exigent circumstances, and there was competent evidence to support the trial court's findings of fact and conclusions of law in denying defendant's motion to suppress. *See Gates,* 462 U.S. 213, 103 S.Ct. 2317, 76 L.Ed.2d 527 (because drug agents independently corroborated anonymous letter that defendants were drug dealers and traveled to Florida from Indiana to transport drugs, probable cause existed); *Draper v. United States,* 358 U.S. 307, 79 S.Ct. 329, 3 L.Ed.2d 327 (1959) (information of Draper's clothing, that he would be walking fast, that he would be arriving on a train from Chicago, and that he would be carrying heroin supplied probable cause because officer had verified every facet of information given him except whether Draper had heroin on him or in his bag which officer could accept as true).

II

Defendant also argues that even if probable cause existed, the search of defendant nevertheless "violated the Fourth Amendment through its intolerable intensity and scope." We agree.

Initially, we note the trial court did not make specific findings of fact regarding the reasonableness of the actual search of defendant, but concluded "none of the defendant's rights under the Fourth Amendment of the United States Constitution or the equivalent provision of the North Carolina Constitution have been violated"; however, because there is no material conflict in the evidence regarding the actual search of defendant, findings on this issue are not necessary, though the better practice is to find facts. *State v. Edwards*, 85 N.C.App. 145, 148, 354 S.E.2d 344, 347, *cert. denied*, 320 N.C. 172, 358 S.E.2d 58 (1987). We therefore determine whether the State has met its burden of proving the search of defendant was reasonable in its scope, thereby supporting the trial court's conclusion none of defendant's Fourth Amendment rights were violated. *Gibson*, 32 N.C.App. at 586, 233 S.E.2d at 86.

The Fourth Amendment's prohibition against unreasonable searches and seizures is "broad and unqualified," "makes no differentiation between persons and property," and "should be construed 'liberally to safeguard the right of privacy.' " *Blackford v. United States*, 247 F.2d 745, 750 (9th Cir.1957), *cert. denied*, 356 U.S. 914, 78 S.Ct. 672, 2 L.Ed.2d 586 (1958). A "search which is reasonable at its inception may violate the Fourth Amendment by virtue of its intolerable intensity and scope." *Terry v. Ohio*,

392 U.S. 1, 17, 88 S.Ct. 1868, 1878, 20 L.Ed.2d 889, 903-04 (1968). In determining whether or not conduct is unreasonable, "[t]here is no slide-rule formula," and "[e]ach case must turn on its own relevant facts and circumstances." *Blackford*, 247 F.2d at 751. In determining reasonableness, courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted. *Bell v. Wolfish*, 441 U.S. 520, 559, 99 S.Ct. 1861, 1884-85, 60 L.Ed.2d 447, 481 (1979). As such, the necessary scope of a search may vary depending on whether the search is conducted before police have effected an arrest, at the time and place of arrest, or at the station house.

> Police conduct that would be impractical or unreasonable – or embarrassingly intrusive – on the street can more readily – and privately – be performed at the station. For example, the interests supporting a search incident to arrest would hardly justify disrobing an arrestee on the street, but the practical necessities of routine jail administration may even justify taking a prisoner's clothes before confining him, although that step would be rare.

Illinois v. Lafayette, 462 U.S. 640, 645, 103 S.Ct. 2605, 2609, 77 L.Ed.2d 65, 71 (1983). "[T]he presence of probable cause to arrest, when the police have not effected an arrest, permits a more limited search than that permitted incident to arrest." *United States v. Alexander*, 755 F.Supp. 448, 454 (D.D.C.1991), *aff'd*, 961 F.2d 964, 1992 WL 94884, *cert. denied*, ___ U.S. ___, 113 S.Ct. 170, 121 L.Ed.2d 117 (1992). Furthermore, "[s]earches akin to strip searches can be justified in public places if limited in scope and

required by unusual circumstances." *United States v. Bazy*, 1994 WL 539300 (D.Kan.1994) (because defendant was not required to disrobe or submit to visual body cavity search and public view was blocked by defendant's clothes, troopers, and the patrol cars, and unusual circumstances for immediate search existed, trooper's reaching into defendant's underwear to remove crack cocaine was reasonable). Under these principles and in balancing the scope of the search against exigent circumstances in determining reasonableness, courts have allowed highly intrusive warrantless searches of individuals where exigent circumstances are shown to exist, such as imminent loss of evidence or potential health risk to the individual. *See Bazy*, 1994 WL 539300 (where officers knew defendant was concealing drugs in rear of his pants, there was danger of imminent destruction of evidence, and there was health risk to defendant, search of defendant by loosening his pants and removing drugs resting against defendant's buttocks was reasonable without search warrant); *Alexander*, 755 F.Supp. 448 (search of defendant's person by reaching inside underwear on public sidewalk reasonable in view of exigent circumstances that delay in search could enable defendant to dispose of drugs in private in bathroom).

Based on these factors for determining reasonableness, the State has not produced evidence to show that the police in this case, although having probable cause to search defendant without a warrant, were reasonable in the manner in which they conducted the search of defendant. The State's evidence shows the police searched defendant by pulling his pants down far enough that Officer Cook could see the corner of a small paper towel

underneath defendant's scrotum. The State's evidence also shows that Officer Cook stood between defendant and the doorway to defendant's car when conducting the search in the middle of an intersection of two main thoroughfares at 1:30 a.m. The State's evidence does not show, however, that where Officer Cook stood or the time the search occurred somehow protected defendant from the view of passing drivers. Furthermore, the State's evidence does not show whether the area was well-lit or dimly lit or whether there were passing cars, if any. We realize that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means," *Lafayette*, 462 U.S. at 647, 103 S.Ct. at 2610, 77 L.Ed.2d at 72, and that the government has an interest in stopping drug trafficking; however, the officers in this case could have easily employed other means of conducting their search of defendant which would have been more protective of defendant's privacy interests. For example, the officers could have searched defendant in the patrol car or effected an arrest and searched defendant at the stationhouse. *See Mills*, 104 N.C.App. 724, 411 S.E.2d 193 (factors establishing probable cause to arrest also establish probable cause to search where facts within officers' knowledge and of which they had reasonably trustworthy information sufficient to warrant man of reasonable caution in belief offense has been committed). The search of defendant in this case was akin to a strip search in a public place and was not "limited in scope" nor "required by unusual circumstances." There is nothing under the facts of this case to suggest that defendant could have disposed of the drugs before being placed in the patrol

car or taken to the station. Under these circumstances, the search of defendant was intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment. For these reasons, the trial court erred in denying defendant's motion to suppress, and defendant is entitled to a new trial.

Reversed and remanded.

EAGLES, J., concurs.

WALKER, J., concurs in part and dissents in part.

WALKER, Judge, concurring in part and dissenting in part.

I concur in the majority opinion that there was probable cause and an exigency for a warrantless search of defendant. However, I respectfully dissent from the Court's holding that the search of defendant was "intolerable in its intensity and scope and therefore unreasonable under the Fourth Amendment."

The majority cites *United States v. Bazy* for the proposition that "[s]earches akin to strip searches can be justified in public places if limited in scope and required by unusual circumstances." *Bazy*, 1994 WL 539300, at 8 (D.Kan.). I believe the facts and holding of *Bazy* suggest that such a search was justified under the circumstances of the instant case. In that case, officers stopped Bazy and a companion on the Kansas Turnpike at 8:30 A.M. A search of both men followed, during which "[t]he troopers unbuckled Bazy's pants and pulled them away from his waist and checked his underwear for drugs." A plastic bag containing cocaine was found lodged between Bazy's buttocks. A trooper then reached into Bazy's pants

and pulled out the bag. The search occurred "on the grassy edge of the roadway between [Bazy's] car and a patrol car" and Bazy "was not exposed to the view of oncoming traffic, as the view was obstructed by the patrol car and by a trooper standing in front of him." *Id.* at 3. The defendant contended that the search was overly intrusive and not justified at the time and place, and that the public location of the search was embarrassing and humiliating. *Id.* The court found that the search, "[w]hile plainly more than a pat-down search," was nonetheless still limited in scope and intensity such that it did not violate the Fourth Amendment. *Id.* at 7. The court recognized that other less intrusive means for searching Bazy may have been available but said that " '[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of' " these less intrusive means. *Id.* (citations omitted). The court refused to "second guess the troopers on this procedure. The court [was] satisfied . . . that the troopers took the necessary and reasonable precautions to prevent the public exposure of the defendant Bazy's private parts." *Id.*

The search in the instant case took place at approximately 1:30 A.M. at the intersection of two streets in Fayetteville. The record does not reveal the conditions at the time, and defendant's objection was that he did not want the officer to "search [his] rear" in "the middle of the street."

Here the evidence does show that prior to the search Officer Cook asked defendant to step behind the open car door of his vehicle and that he positioned himself between defendant and the car door on the outside. Officer Cook said he took these steps "because [he] didn't

want to expose [defendant] to other cars, the public, to embarrass him, that sort of thing." Defendant did not dispute this testimony. Considering the totality of the circumstances, I believe that the officers here, like the trooper in *Bazy*, took "the necessary and reasonable precautions to prevent the public exposure of defendant['s] . . . private areas." While there may have been other less intrusive means of conducting the search, I agree with the Bazy court that the availability of those less intrusive means does not automatically transform an otherwise reasonable search into a Fourth Amendment violation.

Just as the court in *Bazy* was unwilling to second guess the procedures used by the officers in that case, I am unwilling to second-guess the trial court's finding here that the officers' conduct during the search did not violate defendant's Fourth Amendment rights. The trial court in ruling on defendant's motion to suppress had the arguments of both parties before it and was in a superior position to evaluate the reasonableness of the search. I do not believe defendant is entitled to a new trial, and I would affirm the trial court in all respects.

FOURTH AMENDMENT TO THE UNITED STATES CONSTITUTION

The right of the people to be secure in their persons, houses, papers, effects, against unreasonable searches, seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Supreme Court, U.S.
F I L E D
APR 10 1996
CLERK

No. 95-1437

In the
Supreme Court of the United States
October Term, 1995

ALFREDO F. SMITH,
Petitioner,

v.

STATE OF NORTH CAROLINA,
Respondent.

On Petition For A Writ Of Certiorari To The North Carolina Supreme Court

BRIEF IN OPPOSITION

MICHAEL F. EASLEY
North Carolina Attorney General

Robin P. Pendergraft*
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
(919) 733-4723

**Counsel of Record*

QUESTION PRESENTED

I. WHETHER THE MANNER IN WHICH THE OFFICERS SEARCHED PETITIONER, BY REACHING INTO HIS PANTS TO RETRIEVE PACKETS OF COCAINE HIDDEN UNDER HIS SCROTUM, WHILE OFFICERS TOOK PRECAUTIONS TO SHIELD PETITIONER FROM VIEW OF POSSIBLE PASSERSBY, WAS REASONABLE UNDER THE FOURTH AMENDMENT?

This Page Intentionally Left Blank

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF AUTHORITIES v

OPINIONS BELOW 2

JURISDICTION 2

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED 2

STATEMENT OF THE CASE 2

REASONS THE WRIT SHOULD BE DENIED 7

I. THE ISSUE PRESENTED IN THIS CASE IS MERELY THE APPLICATION OF UNIQUE FACTS TO WELL-SETTLED CONSTITUTIONAL PRINCIPLES AND DOES NOT WARRANT REVIEW 7

CONCLUSION 17

This Page Intentionally Left Blank

TABLE OF AUTHORITIES

CASES

Bell v. Wolfish, 441 U.S. 520, 99 S. Ct. 1861, 60 L. Ed. 2d 447 (1979) 10

Gray v. State, 600 So.2d 1076 (Ala. Ct. App. 1992) 15

Illinois v. Lafayette, 462 U.S. 640, 103 S. Ct. 2605, 77 L. Ed. 2d 65 (1983) 16

Pennsylvania v. Mimms, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) 16

State v. Smith, 118 N.C. App. 106, 454 S.E.2d 680 (1995) 10, 12

United States v. Alexander, 755 F. Supp. 448 (D.D.C. 1991), *aff'd*, 961 F.2d 964 *cert. denied*, 506 U.S. 858, 113 S. Ct. 170, 121 L. Ed. 2d 117 (1992) 12, 13

United States v. Ashley, 37 F.3d 678 (D.C. Cir. 1994) *cert. denied*, ____ U.S. ____, 115 S. Ct. 1171, 130 L. Ed. 2d 1124 (1995). 15

United States v. Bazy, 1994 WL 539300 (D. Kan. 1994) 12, 13

United States v. Montoya de Hernandez, 473 U.S. 531, 105 S. Ct. 3304, 87 L. Ed. 2d 381 (1985) . . . 10

This Page Intentionally Left Blank

No. 95-1437

In the
Supreme Court of the United States
October Term, 1995

Alfredo F. Smith,
Petitioner,

v.

State of North Carolina,
Respondent.

On Petition For A Writ Of Certiorari
To The Supreme Court of North Carolina

BRIEF IN OPPOSITION

The respondent, State of North Carolina [hereinafter "State"], by and through its undersigned counsel, the Honorable Michael F. Easley, Attorney General of North Carolina, and Robin P. Pendergraft, Special Deputy Attorney General, requests the Court to deny the Petition for Certiorari filed by the petitioner, Alfredo F. Smith [hereinafter "Smith"], seeking review of the *per curiam* decision of the Supreme Court of North Carolina.

OPINIONS BELOW

JURISDICTION

CONSTITUTIONAL AMENDMENTS AND STATUTES INVOLVED

Satisfied with Smith's statements of the opinions below, jurisdiction, and constitutional amendments and statements involved, the State omits these items pursuant to Supreme Court Rules 15.2 and 24.2.

STATEMENT OF THE CASE

A. Procedural History

Except as set out below, the State is satisfied with Smith's statement of the proceedings in the courts below. On 10 February 1993, petitioner filed a pre-trial motion with a supporting affidavit to suppress evidence found on his person alleging the search of petitioner and seizure of contraband was illegal pursuant to the Fourth Amendment. Prior to trial, a suppression hearing was conducted by the trial court. After hearing testimony from Deputy James E. Cook and petitioner, the trial court entered an order denying Smith's motion to suppress.

B. Statement of Facts

Prior to petitioner's arrest on 12 May 1992, Deputy James E. Cook had received "numerous pieces of information from sources in the area that we [he and other officers with the sheriff's department] had used before, that Alfredo Smith was operating a drug house and was selling drugs in the Bonnie Doone area." These confidential sources in-

formed law enforcement officials that Smith maintained houses for the purpose of having drugs sold for him by getting people in those houses to work for him, delivering drugs to these people, and receiving the profits from the drugs they sold for him. During the two to three years preceding 12 May 1992, Deputy Cook had stopped Smith before and was otherwise familiar with him. Based upon Deputy Cook's training and experience, he testified during the motion hearing that illegal drugs were sold in many different ways in the Bonnie Doone area, to include sales by persons standing on the street corners and working from inside residences.[1]

At approximately 12:15 a.m. on 12 May 1992, Deputy Cook received a telephone call from a confidential source of information that he had used previously in other drug related cases and found to be reliable. The source informed him that Smith was driving that night to an unknown location with about two thousand dollars in his possession to purchase cocaine. Petitioner would be driving a red Ford Escort bearing the license plate number EVN 7322 and would return with the cocaine to a red brick duplex apartment located on a small dirt road off of Johnson Street. The informant described the apartment as the last apartment

---

[1] At the time of Smith's arrest in May 1992, Deputy Cook had been employed as a deputy sheriff with the Cumberland County Sheriff's Department for approximately four years. During those four years, he had been assigned to the Department's Special Operations Unit which is a "street crimes unit targeting street level narcotics." For two or three years preceding May 1992, Deputy Cook had been working in the Bonnie Doone area of Fayetteville, which is a large housing area known to have a drug problem.

on the left at the end of the dirt road, which he believed was 617-D Johnson Street. The informant explained that once Smith returned to the apartment he would cut up the cocaine, package it in aluminum foil, quickly depart and drive to a house on Buffalo Street, off of Bragg Boulevard, to deliver the cocaine for subsequent selling. The source added that Smith would transport the packaged for sale cocaine concealed on his person, under his crotch.

Immediately thereafter, Deputy Cook contacted his supervisor and his partner in the Cumberland County Sheriff's Department, Rick O'Briant, and asked O'Briant to meet him at a specified location. Together they picked up the informant who guided them to the apartment off of Johnson Street. As the three drove a short distance down the dirt road, the informant pointed to a small red Ford Escort parked in front of the last apartment on the left and stated "that's the vehicle." He also showed the officers the apartment where Smith was preparing the cocaine. The officers backed out of the roadway to avoid detection and subsequently released the informant. The time was approximately 1:15 a.m.

Before the informant was released, he informed the officers that Smith would be staying for only a short period of time at the apartment. He explained that the house on Buffalo Street had sold out its supply of cocaine and petitioner was trying to deliver more cocaine to his sellers.

The officers thereafter positioned their two vehicles so that they could observe Smith leave the apartment. At approximately 1:30 a.m., the red Ford Escort drove onto Johnson Street from the dirt road heading toward Bragg Boulevard. Deputy O'Briant began to follow the red car,

informed Deputy Cook of the car's direction, and confirmed that a black male was operating the vehicle bearing the license plate number of EVN 7322. After the officers activated their blue lights, the red vehicle stopped in the left turn lane on Johnson Street just prior to Bragg Boulevard, with Deputy Cook's vehicle in front of Smith's car and Deputy O'Briant's patrol vehicle behind Smith. They approached the stopped car and recognized the driver as petitioner. After the officers identified themselves, Deputy Cook informed Smith they had information that he was transporting cocaine in his vehicle and on his person and they intended to search him and his vehicle.

Initially Deputy Cook conducted a weapons search of Smith and his car using his flashlight and hands. Once no weapons were discovered, Deputy Cook told Smith he believed Smith had cocaine concealed inside his underwear and he wanted to look for the drugs there. Deputy Cook asked petitioner to stand behind the Ford Escort's open car door with his back to the door. The deputy then stood next to Smith who was, at that point, facing him in order to provide some privacy. Deputy Cook testified that he "stepped in between [Smith] and the doorway because [he] didn't want to expose [Smith] to other cars, the public, to embarrass him, that sort of thing."

At Deputy Cook's request, Smith opened his cut-off blue jean shorts and held open his underwear. Using a flashlight the officer peered down into Smith's underwear, both front and rear. Deputy Cook could see nothing and realized that petitioner, using both hands, was holding his underwear very tightly against his crotch such that it was impossible to see underneath petitioner's scrotum. When the deputy asked Smith to pull his underwear down a little

farther so that the deputy could see better, he refused to comply. Finally, Deputy Cook slid petitioner's underwear down himself, whereupon using his flashlight he saw the corner of a small paper towel underneath petitioner's scrotum. Thereafter, when Deputy Cook pulled the underwear down farther in an attempt to retrieve the paper towels, petitioner "resisted a little bit."

Deputy Cook removed the paper towel from underneath Smith's scrotum and discovered sixteen small foil-wrapped packets inside the towel. Inside each packet was a brownish rock-like substance which the officer believed to be crack cocaine. A field test of the substance indicated it was cocaine. Deputy Cook arrested and charged Smith with various violations of North Carolina's controlled substances act.

Smith testified that he was stopped by Deputies Cook and O'Briant on Johnson Street in the early morning hours of 12 May 1992. He indicated that he agreed to let the officers search his car because they threatened him. After searching Smith's car, Deputy Cook asked Smith to pull his underwear down. Smith pulled out his shorts and underwear and allowed Cook to look in using a flashlight. When Deputy Cook requested Smith to turn around, Smith refused stating "[y]ou are not searching me in my rear, in my butt, in the middle of the street . . .." Deputy Cook grabbed petitioner's shorts and underwear and pulled it down and searched by shining his flashlight. Petitioner testified that Deputy Cook conducted a second search of his car, then informed petitioner he was going to search him again. The officers grabbed petitioner's hands and searched him again, which resulted in the finding of the cocaine.

REASONS FOR DENYING THE WRIT

I. THE ISSUE PRESENTED IN THIS CASE IS MERELY THE APPLICATION OF UNIQUE FACTS TO WELL-SETTLED CONSTITUTIONAL PRINCIPLES AND DOES NOT WARRANT REVIEW.

Petitioner requests that this Court issue its Writ of Certiorari to consider whether the manner in which law enforcement officers searched him was reasonable within the meaning of the Fourth Amendment. In his Petition, Smith characterizes this search as a "strip search", indicating that he was forced "to disrobe." Neither court below characterized this search in this manner.

It is the State's position that the Supreme Court of North Carolina correctly held the search of petitioner to be reasonable under the factual circumstances and in accordance with the law. The State disputes petitioner's characterization of the search. We contend that the facts in this case fail to sustain any alleged violation of petitioner's constitutional rights. This case's factual uniqueness should preclude review by this Court.

The trial court found the search did not violate the Fourth Amendment, based upon its evaluation of the witnesses and their versions of what transpired on Johnson Street, in addition to Smith's failure to clearly and specifically object at trial that the manner of the search was intolerable. Smith's motion to suppress and his supporting affidavit focused primarily on the existence of probable cause to search his person and apartment. (Rpp. 5-9). During the suppression hearing, defense counsel never while cross-examining Deputy Cook asked about the manner in which he

searched petitioner. Defense questions concentrated on the informant and the search of the apartment. (Tpp. 24-29, 30-31). More importantly, however, is the light cast upon this picture by Smith's own testimony. According to petitioner:

> He [Deputy Cook] asked me to -- he's patting me down. And then he asked me to pull my underwear -- my clothing down. I did not have on jeans. I had a short set. I had jockey strap underwear.
>
> So, I pull out my under -- I pull out my short set, along with the underwear, and show him my testicles. He had his flashlight in his hand. He instructed me to move it to the left, move it to the right. Meanwhile he was shining down there. Okay?
>
> So then he said, well, I want you to turn around. I said hell no. You are not searching me in my rear, in my butt, in the middle of the street. Here we go. We standing [sic] in the middle of the intersection of Bragg Boulevard and Johnson Street. He wants to search my rear.
>
> So, I tried to refuse, but I couldn't fight it off. He grabbed a'hold of my short set and my underwear, pulled it down, and shined his flashlight in my butt. **No problem**.
>
> He instructed me to go back and stand right next to Officer O'Briant. He conducted a second search of the car. Went through the car again, right? When he got through, he came back to me again. He said I wants [sic] to search you again. I wants [sic] to see your

> underwear again. I said no. You've already search me. You don't need to search me again.
>
> So he instructed me to pull my underwear the same way that I did. When I refused to -- I did agree to pull it out like this. When I did like this again, he wanted to stick his hand down there. And I say what are you doing. By the time I say that, they both grab a'hold of my hand. And Officer O'Briant had my left hand and Officer Cook had my right hand, and they kind of lean [sic] me backwards, like this.
>
> Officer Cook then **proceeded to shine the light down there, switched the flashlight he had and went down in my underwears [sic] while I'm being held. And he come [sic] up with the tissue paper,** okay?

(Tpp. 34-35) (emphasis added). One could reason that while Smith did not want to be discovered with drugs hidden on his person, he basically had "no problem" with the officer's search of him with the flashlight on his backside. According to Smith, the last search in which the officers had to physically restrain him consisted of Deputy Cook **reaching down in petitioner's underwear** and retrieving the tissue paper. Based upon Smith's own testimony, it would seem that his shorts were only open and not pulled down to any significant degree. The above reasons, combined with Deputy Cook's described efforts to shield Smith during the search, support a finding that the scope of the search was reasonable.

There is no dispute that the Fourth Amendment establishes the right to be free from unreasonable searches

and seizures. The question of whether a particular search or seizure is reasonable depends upon all the surrounding facts and circumstances, including the nature of the search or seizure. *United States v. Montoya de Hernandez*, 473 U.S. 531, 537, 105 S. Ct. 3304, 87 L. Ed. 2d 381, 388 (1985).

> The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of personal rights that the search entails. Courts must consider the scope of the particular intrusion, the manner in which it is conducted, the justification for initiating it, and the place in which it is conducted.

Bell v. Wolfish, 441 U.S. 520, 559, 99 S. Ct. 1861, 60 L. Ed. 2d 447, 481 (1979). Based upon the limited scope and manner of the intrusion and the justification for the search, the North Carolina Supreme Court correctly concluded that the motion to suppress was properly denied.

The North Carolina Court of Appeals, in its majority opinion, characterized the search of Smith as one "akin to a strip search" which was not limited in scope nor required by unusual circumstances. *State v. Smith*, 118 N.C. App. 106, 116, 454 S.E.2d 680, 686 (1995). The search here did not rise to the level of a strip search since petitioner was not required to completely disrobe or remove from his person any clothing. Deputy Cook described the search in the following manner:

> I used my flashlight, and he opened his trousers and I looked down into his underwear, to

the front of his underwear. And he held his -- as he was holding his trousers open, he held the underwear with both hands, was holding very tightly against his crotch to where I couldn't see underneath his scrotum or testicles.

I looked behind him towards his rear and to the front I couldn't see him. I asked him to pull it down farther. He resisted to pulling it down. Finally I walked to the front of him and held his underwear myself and slid it down. As which point with my flashlight I could see the corner of a small paper towel underneath his scrotum. I then pulled his underwear farther. He resisted a little bit. I pushed him back into the door and reached into, uh -- underneath his scrotum and removed the paper towel.

. . .

Q. When you described his resisting -- you said he resisted you, I believe, during the time that you were trying to examine his underwear. Can you describe what resisting he did?

A. Well, I kept asking him to pull his underwear down farther to where I could see. He would pull them out where you could see in front, but he would not pull them down where I could see underneath his scrotum.

Q. Did you instruct him to pull them down?

A. Yes.

Q. And he did not?

A. No.

(Tpp. 22-24). "Searches akin to strip searches can be justified in public places if limited in scope and required by unusual circumstances." *United States v. Bazy*, 1994 WL 539300 at p. 8 (D. Kan. 1994).

In reaching their conclusions the North Carolina courts analyzed the facts here in light of recent federal court cases, *United States v. Bazy*, 1994 W.L. 539300 and *United States v. Alexander*, 755 F. Supp. 448 (D.D.C. 1991), *aff'd*, 961 F.2d 964, *cert. denied*, 506 U.S. 858, 113 S. Ct. 170, 121 L. Ed. 2d 117 (1992). Citing *Bazy*, the North Carolina Court of Appeals majority opined that "in balancing the scope of the search against exigent circumstances in determining reasonableness, courts have allowed highly intrusive warrantless searches of individuals where exigent circumstances are shown to exist, such as imminent loss of evidence or potential health risk to the individual." *Smith*, 118 N.C. App at 115, 454 S.E.2d at 686. The North Carolina Supreme Court agreed with the North Carolina Court of Appeals dissent's assessment that the facts and holding of *Bazy* suggest that Deputy Cook's search of Smith was justified under the circumstances.

In *Bazy*, a trooper with the Kansas Highway Patrol stopped Bazy and his companion on the Kansas Turnpike at about 8:30 a.m. for a possible traffic violation. Following the stop, both men and the car were searched by troopers, whereupon the "troopers unbuckled Bazy's pants and pulled

them away from this waist and checked his underwear for drugs." *Bazy* at p. 3. Upon viewing a substance wrapped in plastic lodged between Bazy's buttocks, the trooper reached into Bazy's pants and removed the plastic bag. The search occurred on a "grassy edge of the roadway between the defendant's car and a patrol car." *Id.* Any view of Bazy by oncoming traffic was obstructed by the patrol car and a trooper standing in front of him. Based upon those facts, the court in *Bazy* found the search to be limited in scope and intensity such that it did not violate the Fourth Amendment. *Id.* at p. 7.

The court in *Alexander* similarly found that a search conducted by a Washington, D.C. Metropolitan Police detective did not violate that defendant's Fourth Amendment rights. There, defendant Alexander disembarked from a bus at the Greyhound Bus station in Washington D.C. at about 6:30 p.m. on 4 October 1990, and left the station on foot. About a block and a half away, the detective stopped Alexander, questioned him and searched him while on the sidewalk of First Street. The detective subsequently reached inside the front of Alexander's underwear and removed a bag containing cocaine. That court cited as exigent circumstances the possibility that a delay in searching Alexander could have enabled him to dispose of the concealed drugs. 755 F. Supp. at 455.

Based upon the above cases and the relevant factors for determining reasonableness, the State produced sufficient evidence to show that the manner in which Deputies Cook and O'Briant conducted their search of petitioner was reasonable. Here, the officers stopped Smith's vehicle in the left turn lane on Johnson Street just prior to Bragg Boulevard, positioning a police vehicle in front of and behind

Smith's car. Considering the time of morning, 1:30 a.m., and the testimony from both Deputy Cook and petitioner regarding the extensive use of flashlights by the officers, one could easily surmise that the visual acuity at that time was greatly impaired by the lack of light, such that darkness prevailed. Moreover, prior to the search, Deputy Cook asked petitioner to step behind the open car door of petitioner's vehicle and positioned himself between petitioner and the car door. Deputy Cook specifically explained that he took those precautions "because [he] didn't want to expose [Smith] to other cars, the public, to embarrass him, that sort of thing." As pointed out in the North Carolina Court of Appeal's dissenting opinion, petitioner did not dispute Deputy Cook's testimony regarding these precautions. His main objection was that he did not want the deputy to "search [his] rear" in "the middle of the street." Clearly, the officers took steps to protect Smith's privacy interests.

Additionally, the State's evidence showed that during the search Smith held his underwear with both hands and was holding it very tightly against his crotch. Deputy Cook pulled petitioner's underwear down to a point where he could see the corner of a small paper towel underneath petitioner's scrotum. Neither witness clearly indicated the exact position of Smith's pants on his body after the deputy pulled on them. A reasonable person could conclude, however, that had petitioner's underwear been pulled down below his genitalia, the deputy would have seen more than just a "corner" of the paper towel. He would have had a clear view of the paper towel holding sixteen small foil-wrapped packets of crack cocaine. Even Smith testified that at the time Deputy Cook retrieved the paper towel he "went down in [petitioner's] underwears [sic]", which would indicate that petitioner's

clothing still covered his lower body and private areas since the deputy had to reach down into petitioner's pants. Contrary to petitioner's repeated assertions, the facts simply do not support petitioner's allegation that the government forced him to disrobe in public and bare his genitals to all passersby.

Upon considering the totality of the circumstances in the instant case, Judge Walker concluded in his dissent to the North Carolina Court of Appeals majority opinion that the officers, "like the trooper in *Bazy*", took the necessary and reasonable precautions to prevent the public exposure of Smith's private areas. The North Carolina Supreme Court agreed that the manner in which the officers conducted the search was entirely reasonable. *See also United States v. Ashley*, 37 F.3d 678 (D.C. Cir. 1994) *cert. denied*, ____ U.S. ____, 115 S. Ct. 1171, 130 L. Ed. 2d 1124 (1995). (Search and seizure of drugs from inside bus passenger's underwear while standing at the side of the bus station did not constitute an invasion of privacy since precautions were taken to ensure that defendant was not subjected to public embarrassment.)

Furthermore, exigent circumstances did in fact exist in this case. A delay of the search until the officers could transport petitioner to their department would have greatly increased the possibility that petitioner could dispose of the drugs. Law enforcement officer's are well aware that items such as contraband often find their way into the creases of a patrol car's back seat or the car's floor board. *See Gray v. State*, 600 So.2d 1076 (Ala. Ct. App. 1992). (Defendant convicted of unlawful possession of marijuana found in back area of the patrol car only because the officer was able to testify that he had inventoried his patrol car prior to the

arrest and no one else sat in the back seat during the rest of his shift prior to the discovery of the bag.)

Finally, petitioner acknowledges this Court's opinion in *Illinois v. Lafayette*, 462 U.S. 640, 647, 103 S. Ct. 2605, 77 L. Ed. 2d 65, 72 (1983) that "[t]he reasonableness of any particular governmental activity does not necessarily or invariably turn on the existence of alternative 'less intrusive' means". Yet, petitioner proposes examples of other "less intrusive" means the officer could have "easily employed." We have already discussed the problems associated with the suggestion that the officers search petitioner after transporting him to their department. Furthermore, it would be most difficult, if not impossible to search the crotch of a person's underwear while he is sitting within the confines of a patrol car. The difficulty would continue to exist should the subject be required to lie down in the car. More importantly, however, an attempt to search a subject in the back or front seat of a car would unnecessarily expose an officer to danger from a resisting subject. Finally, law enforcement officers in North Carolina are trained to thoroughly search subjects prior to placing them in the officers' patrol vehicles, in order to protect the officers and preserve the evidence. *See Pennsylvania v. Mimms*, 434 U.S. 106, 98 S. Ct. 330, 54 L. Ed. 2d 331 (1977) (concern for safety of officer provides adequate justification for officer requesting driver to step out of his vehicle).

Based upon the circumstances of this particular case, the North Carolina Supreme Court joined the lower court's dissenting opinion in declaring an unwillingness to "second-guess" the trial court's finding that the officers' conduct during the search of Smith did not violate his Fourth Amendment rights. The trial court was in a "superior position to

evaluate the reasonableness of the search". The North Carolina Supreme Court correctly held that the search of Smith was not intolerable in its intensity and scope.

CONCLUSION

The issue contained herein is the application of specific facts, albeit apparently controverted, to well settled constitutional principles, and such, does not warrant review by this Court. The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

MICHAEL F. EASLEY
Attorney General

*Robin P. Pendergraft
Special Deputy Attorney General

North Carolina Department of Justice
Post Office Box 629
Raleigh, North Carolina 27602
Telephone: (919) 733-4723

*COUNSEL OF RECORD

April 10, 1996